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OF THE UNITED STATES

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OCTOBER TERM, 1983

82-6768

DEBORAH RENE FINNEY,

Appellant,

v

MICHIGAN DEPARTMENT OF SOCIAL SERVICES,

Appellee.

* * * * * *

(In re Taurus F., a Minor.)

APPELLANT'S RESPONSE TO APPELLEE MICHIGAN DEPARTMENT OF SOCIAL SERVICES' MOTION TO DISMISS OR AFFIRM

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APPELLANT'S RESPONSE TO APPELLEE MICHIGAN DEPARTMENT OF SOCIAL SERVICES' MOTION TO DISMISS OR AFFIRM

I. Introduction

In this combined appeal and petition for a writ of certiorari, Appellant, Deborah Rene Finney, seeks this Court's review of an order, affirmed by an equally divided Michigan Supreme Court, terminating her parental rights to her daughter, Taurus.

Appellant's Jurisdictional Statement was docketed on May 19, 1983. Through a letter from the Clerk of the Court, the Court ordered Appellee to respond to Appellant's Statement. The State's response was filed on October 11, 1983.

This response brief will address the state's arguments that there are no Federal questions raised in this appeal. Appellant will not respond to Appellee's conclusion that the issues raised by this appeal are not substantial.

Throughout the course of this case and its brief, Appellee asserts factual statements without reference to the record. These assertions are both inappropriate and misleading.

Appellant believes that the relevant facts for this appeal are those stipulated to by the parties (77-79a), approved by the Circuit Court (79a), and incorporated in Chief Justice Williams' opinion for reversal (415 Mich 519, 22, 7-9a).

In her Jurisdictional Statement, Appellant Finney updated the Personal Facts section of the stipulation by stating that she has been released from prison and is caring for her two older children. Defendant objects to this statement as being without support in the record. (Brief, page 6) The order of the Honorable Justin Ravitz, dated February 5, 1982, resentencing Miss Finney to 2 years probation is part of the Michigan Supreme Court record in this case. See, Michigan Supreme Court Appendix at 325a. The Justices for reversal explicitly recognized Miss Finney's release. 415 Mich 550, 33a. Appellant's statement concerning her release is both accurate and supported by the record.

II. This Case Raises Substantial Federal Questions.

Appellant requests Supreme Court review of four constitutional issues implicit in the Michigan Supreme Court's termination of her parental rights. None of these issues was directly addressed by the Michigan Supreme Court.

The Michigan Supreme Court decision was an affirmance by an equally divided court. The Justices for reversal did not reach the constitutional questions because they reviewed the case on state statutory grounds. The Justices for affirmance in an opinion devoid of citation simply ignored these constitutional claims.

Appellant's constitutional claims were properly raised in the state courts and are appropriately reviewed in this court.

A. The Constitutionality of MCL 712A.19a(d)[1]

The statute upon which the termination of Miss Finney's parental rights is based is unconstitutional because it discriminates on its face against inmate parents and because it is impermissibly vague. See Jurisdictional Statement at pages 15-19.

1. The Basis of the Termination

The state asserts that this termination is not based on MCL 712A.19a(d). (Brief page 8) This suggestion contradicts the legal conclusion of every Michigan court that has addressed this issue.

Appellee's own amended petition sought termination under the statute. (75-76a) The Probate Court termination order of July 1978 quotes the statute verbatim. (41-42a) The Circuit Court opinion considers and upholds the constitutionality of the statute on

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[1] Where a child remains in foster care in the temporary custody of the court following the initial hearing provided by section 19, the court may make a final determination and order placing the child in the permanent custody of the court, if it finds any of the following:

* * * *

(d) A parent or guardian of the child is convicted of a felony of a nature as to prove the unfitness of the parent or guardian to have future custody of the child or if the parent or guardian is imprisoned for such a period that the child will be deprived of a normal home for a period of more than 2 years.

appeal. (45-48a) The July 1982 remand order of the Michigan Supreme Court directs the Probate Court to make findings concerning "its disposition of this matter pursuant to MCL 712A.19a(d)." (56a) On remand, the Probate Court again specifically makes its termination findings under the statute. (60-61a) See also, 415 Mich 518. (7a)

No court involved in this case has ever suggested another basis for the termination of Appellant's parental rights besides MCL 712A.19a(d). Appellee's argument that MCL 712A.19a(d) is not relevant to the appeal in this case is an astonishing misstatement of a clear record.

2. Preservation of the Issue

The state also suggests that Appellant did not raise the issue of the constitutionality of MCL 712A.19a(d) in the state courts. In her claim of appeal to the Circuit Court and her first appeal brief, which were Appellant's first written pleadings in this case, Miss Finney challenged the constitutionality of MCL 712A.19a(d). (80-82a) The Circuit Court ruled on this claim and upheld the statute. (45-48a)

There are indications that the Michigan Supreme Court acknowledged that Appellant's claims concerning the statute were properly before it. Most significantly, the Justices for reversal stated they need not reach the constitutionality of MCL 712A.19a(d) because that would reverse on a state gound. 415 Mich 518, 7a. The court as a whole remanded the case to the Probate Court for findings under the statute. (56a) See also, In re Mudge, 116 Mich App 159, leave held in abeyance, 414 Mich 903 (1982), involving a challenge to MCL 712A.19a(d) and citing In re Finney.

Although Appellee argues below that Appellant's constitutional claims were not preserved, no Michigan court refused to hear these claims. Instead, both lower courts' handling of this case suggests that the state court was required to face the issue.

Appellant Finney adequately preserved her constitutional claims in the state courts, and the state courts' resolution of these

claims makes further inquiry by this Court unnecessary. See, Oscala Star-Banner Co., v. Damron, 401 US 295 (1970). If there is any question whether Appellant's constitutional claims were properly raised by the state courts, this Court should continue this case to provide Appellant an opportunity to obtain a certificate to that effect from the Michigan Supreme Court, not dismiss Appellant's appeal.[2] Lynumn v. Illinois, 368 US 908 (1961).

B. The Michigan Supreme Court's Interpretation of MCL 712A.19a(d)

Appellee does not argue that issues II and III of Appellant's Jurisdictional Statement[3]

are not properly before the court.

Since these issues are unanticipated interpretation of state law articulated for the first time by the state Supreme Court, Appellant has had no prior opportunity to raise these issues. See, Brinkerhoff-Faris Trust Co. v. Hill, 281 US 673 (1930).[4]

The state argues that these constitutional claims are foreclosed because they are based on a fact -- that Miss Finney's sister, Michelle Thomas, was available as a caretaker for Taurus -- that was decided against Appellant. The state argues that Appellant's arguments are "moot" because they are foreclosed by a

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[2]Contrary to Appellee's assertion, Davis v. Wechsler, 263 US 22 (1923), does not permit states through procedural rules to preclude appellate review of Federal law issues. The case states that "the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." 263 US at 24

[3]II. Whether MCL 712.A.2(b), MSA 27.3178(598.2)(b), as construed to provide that children whose parents voluntarily wish to place them in the custody of relatives are "without proper custody" and subject to the jurisdiction of the court, violates appellant's rights under the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

III. Whether a State, in a parental rights termination case, may, consistent with Santosky v. Kramer, _____ US _____, 102 S Ct 1388 (1982), shift the burden of producing evidence as to the adequacy of the family placement for the child from the State to the parent.

[4]As in Brinkerhoff-Faris, Appellant raised these issues to the state Supreme Court through a motion for rehearing. The court denied Appeallant's motion without opinion. (40a)

"legal conclusion of fact". See Brief p. 12.

Appellee's argument misstates the central conclusion of the opinion for reversal. The Justices for reversal found based on the record at trial that Miss Thomas was neither "unavailable" (because there was no explicit agreement between sisters) or "unsuitable" as a placement for Taurus. These Justices therefore concluded that the Probate Court lacked jurisdiction to place the child or consider the termination of parental rights. 415 Mich 549. (31a) See discussion at 27-28a. (6-7a)[5]

Neither Appellee's "mootness" theory nor its finding of "legal fact" is factually or legally supportable.

C. Due Process Violations in the Assumption of Jurisdiction

Appellant argues that the state's procedures in assuming custody of her child violate her due process rights. Appellee argues that these claims were not properly preserved.

Appellant briefed and argued this issue to the Michigan Supreme Court. (95-103a) The Justices for reversal decided the case on statutory grounds, thus avoiding the constitutional question. The Justices for affirmance simply ignored Appellant's constitutional claims. Neither opinion declines consideration of this issue because of a failure to timely raise the issue.

Appellee's response to Appellant's Jurisdictional Statement underscores the seriousness of the constitutional violations.

1. Ex Parte Assumption of Jurisdiction

Appellant claims that the state has a duty to provide parents facing the loss of their children with notice of the hearing where custody over a child will be assumed unless an emergency situation precludes notice. Appellee argues that notice to and an appearance (an appearance without counsel) by Miss Finney 11 days after her child was taken satisfies due process. (Brief page 14-15)

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[5]The language cited by Appellee in its brief to support this purported "legal fact" refers to the family's placement plans post judgment "if the mother now released from prison seeks custody for herself." 415 Mich 550.

2. Right to Counsel

The state argues that Miss Finney was not deprived of her right to counsel because "counsel for Appellant was present and able to object to every single word of testimony ever taken on this case." (Brief page 16)

This statement is simply untrue. Miss Finney appeared without counsel at the April 3, 1978 hearing. (73-74a) She requested counsel and an adjournment. (104-106a) Testimony was taken. (106a) The jurisdictional findings from the April 3, 1978 hearing were considered by the court in terminating Appellant's parental rights. (41a) Appellee argues that the post hearing appointment of counsel who has the right to "hear the tapes" (2b) of prior hearings satisfies Appellant's constitutionally based right to counsel. (Brief 15-16)

3. Failure to Disclose Favorable Evidence to the Court

Appellant argues that her due process rights were violated when the state failed to disclose to the court that Miss Thomas was interested in caring for Taurus and instead, on three separate occasions, represented to the court that no relatives were willing to care for the child. (69-70a; 72a; 105-106a)

The state argues that the court was fully informed as to Miss Thomas' interest in Taurus through later statements by Appellant's counsel and through Miss Thomas' trial testimony. (Brief page 16, 2b)[6]

Appellee seems to suggest that Aappellant's later opportunities to correct record the record cure the states's nondisclosure.

The constitutional violations apparent from the record are egregious. These violations permitted the Ex Parte assumption of jurisdiction over Miss Finney's child, and that assumption of

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[6]The state also attaches a page of "Telephone Notes" from an anonymous DSS worker. (1b) These notes appear to confirm that Miss Thomas contacted the department "to take the baby" prior to the date of the petition. Neither the fact of Miss Thomas' contacts or these handwritten notes were presented to the court for its determination of jurisdiction.

jurisdiction has irretrievably prejudiced Appellant and her family in these proceedings. At each subsequent hearing family separation has been the status quo.

Constitutional protections of family integrity must be enforced from the outset of the juvenile process to prevent "emergency" assumptions of jurisdiction from casting a long shadow over the private lives of families.

CONCLUSION

For the reasons set forth above, Appellant Deborah Rene Finney, respectfully requests this Court to deny Appellee Michigan Department of Social Service's motion to dismiss or affirm, to note probable jurisdiction, and to schedule this case for argument.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Robert Gillett hereby certifies that on the 27th day of October 1983, he caused to be mailed by first class mail 2 copies of Appellant's Response to Appellee Michigan Department of Social Services' Motion to Dismiss or Affirm to:

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